UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.9/SR.538
3 July 1995
ENGLISH
ORIGINAL: FRENCH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 538th MEETING

Held at Headquarters, New York,
on Monday, 13 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

CONTENTS

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference and Support Services, room DC2-794, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

94-80972 (E)

The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396 and Add.1)

Chapter III

Section E (continued)

1. The CHAIRMAN, replying to a question raised by the representative of Thailand, said that paragraph 3, in brackets, was highly controversial and would therefore probably be deleted.

Section F

2. Mr. GRIFFITH (Observer for Australia) said that a basic principle of common law held that, in judicial proceedings, documentary evidence produced by the parties during the "discovery" process should enjoy a certain degree of confidentiality in that it could only be used in the case at hand and could not be divulged. However, according to a decision rendered in a recent case in Australia, such protection did not extend to evidence submitted in arbitral proceedings. Many arbitration rules, including those of UNCITRAL, did not address the issue of confidentiality of evidence or testimony. Bearing in mind that it was precisely the confidential character of arbitration that was often a determining factor in the choice of that procedure, it would therefore be desirable for the Guidelines to deal, either in section F of the check-list or elsewhere, with the question of confidentiality.

3. Mr. HERMANN (Secretary of the Commission) said that the secretariat had already anticipated that point. There was growing interest in the question of confidentiality, as the conclusions drawn during the preparation of the new World Intellectual Property Organization arbitration rules showed. It remained to be seen how the question should be addressed in the Guidelines. Suggestions from delegations on that topic would be welcome, even after the session.

4. Mrs. VERDON (Canada) said that during the consultations that had taken place in Canada regarding the Guidelines it had been pointed out that the question of disclosing confidential information was always a sensitive one, particularly since, under the laws of certain countries, confidentiality could no longer be invoked once information had been disclosed. It would thus be appropriate to include the question in the Guidelines, preferably in section F.

5. Mr. HOLTZMANN (United States of America) also felt that the check-list should include an item that would allow the parties to obtain information on the extent of confidentiality. A good example in that respect was article 20 of the UNCITRAL Arbitration Rules. It would also be better to use a word like "arrangement" in paragraphs 4 and 5 to avoid having to deal with matters of simple and irrebutable presumptions.

6. The penultimate sentence of paragraph 11 should be deleted, as it gave the impression that the Commission was not in favour of disclosing purely internal

documents. Actually, internal documents such as the minutes of a meeting of a board of directors on a specific contract or lists of shareholders in cases where a person's shareholder status was being contested could be extremely important. The party that did not have access to them would have to be able to find out about them, which frequently would not be facilitated by their transmission to a third party. Finally, he saw a need to revise the final phrase in paragraph 13, which alluded to the risk of self-incrimination, a concept which by definition dealt with criminal rather than civil law.

7. Mr. SEKOLEC (International Trade Law Branch) explained that the conditions listed in paragraph 11 had been largely inspired by the International Bar Association's rules on production of evidence, which had been drawn up taking the standard practices of various legal systems into account. In that text, the condition concerning internal documents was imperative, barring all requests for communication of such documents, where paragraph 11 allowed for the possibility of leaving the decision up to the arbitral tribunal.

8. The CHAIRMAN felt that the text represented a happy medium and took into account the rules in effect in different systems regarding disclosure.

Section G

9. Mr. HOLTZMANN (United States of America) said he hoped that the secretariat would revise the final sentence of paragraph 3, as it was not clear whether it implied that employees could be heard as witnesses during an inspection.

Section H

10. Mr. HOLTZMANN (United States of America) said that the final sentence of paragraph 3, perhaps also inspired by the International Bar Association's rules of evidence, which were very flexible on that point if taken as a whole, strongly resembled a recommendation. The decision to take oral evidence must be left entirely to the parties. The Commission had to be absolutely neutral on that point, the best course being not to mention it at all. However, it could be prominently included in future guidelines on submission of evidence. In other words, either the topic should be discussed in greater detail or the sentence should be deleted entirely.

11. Mr. RENGER (Germany) sought further clarification of paragraph 6, and especially on the various possible solutions.

12. Mr. SEKOLEC (International Trade Law Branch) explained that the solution mentioned in paragraph 6 was the simplest, since it stayed within the framework of arbitral proceedings. The other solutions were based on certified written statements and thus required the involvement of external institutions.

13. Mr. CHOUKRI SBAI (Morocco) stressed that the solution mentioned in the last sentence of paragraph 6 was unknown in certain legal systems. In his country, for example, the oath was a sine qua non of evidence and could be dispensed with only in very exceptional cases. The sentence should therefore be reworded to say, for example, that the parties would agree to have the witnesses sign a

written statement certifying the veracity of their testimony, or that the arbitral tribunal could propose that solution to the parties.

14. Mr. HOLTZMANN (United States of America) said that the representative of Morocco had put his finger on a problem that had to be taken into account in the Guidelines, i.e. the great diversity from one country to another of procedures for authenticating written statements, certifying signatures and taking oaths. It was therefore important that the arbitrators should be certain at the preparatory conference stage that the parties knew exactly what formalities had to be observed when written statements were submitted. It would also be useful to have more information about the way oath-taking was administered in connection with oral testimony by witnesses.

Section H

15. Mr. HOLTZMANN (United States of America) said that the secretariat had made a commendable effort under item (ii) to provide an overview of the rules for the production of evidence around the world. It was, however, an overly ambitious task that threatened to create more problems than it solved. For the purposes of the check-list, it was enough to try to decide how the parties and the arbitrators intended to take oral evidence from witnesses instead of proposing six or seven different methods. Paragraphs 8 to 12 could therefore be dispensed with.

16. Mr. BONELL (Italy) agreed in part with the representative of the United States of America, but thought that he went too far. Only paragraphs 8 and 9 needed to be deleted, as paragraphs 10 to 12 had their own practical importance.

17. Mr. HOLTZMANN (United States of America), referring to the first sentence of paragraph 15, noted that in many legal systems, particularly in the United States, the persons involved in the settlement of a dispute were treated in exactly the same way as any other witnesses. He suggested, therefore, that the phrase "it is widely held that" should be deleted, unless there was another way to restore the necessary balance to the paragraph.

Section I

18. The CHAIRMAN said that, in the absence of any comments on that section, he would take it that the Commission wished to approve it.

Section J

19. Mr. HOLTZMANN (United States of America), referring to paragraph 2 under item (i), said that while it was appropriate to ask the parties what materials they intended to submit and when, it was not appropriate to address the content of those submissions, as mentioned in the paragraph. The UNCITRAL Arbitration Rules, along with nearly all others, left that issue to the discretion of the parties. The only rules that went into detail even to the slightest degree, those of the International Centre for Settlement of Investment Disputes, did not go nearly as far as paragraph 2.

20. The Guidelines also should not discuss the advantages and disadvantages of simultaneous or consecutive submission of materials, as mentioned in paragraph 5, under item (iii). Everything depended on the circumstances of the case, and it was better to allow the arbitral tribunal to decide for itself.

Section K

21. Mr. GRIFFITH (Observer for Australia) said that the remarks in that section appeared to be included under the heading "Agenda". The actual remark itself was of no interest and should be deleted. All that should be retained under the "Agenda" heading was: "Consider some practical details concerning writings and exhibits". The rest of the text would appear under the "Remarks" heading.

22. Mr. HERRMANN (Secretary of the Commission) explained that the section entitled "Agenda" had been considerably expanded because a proposal had been made to issue a separate brochure containing only the agenda items. "Consider some practical details concerning writings and exhibits" would thus be inadequate. If the proposal to issue such a brochure was not retained, there would be no problem in proceeding as the observer for Australia had suggested.

23. Mr. GRIFFITH (Observer for Australia) said he believed that it would indeed be wise to present separately the contents of the Guidelines, meaning the items themselves and some remarks directly related to them, along with the comments of a more general nature which were currently scattered throughout the text.

24. Mr. HERRMANN (Secretary of the Commission) said that what he had described was not exactly what the observer for Australia had in mind. The case he had mentioned would involve retaining the Guidelines in their current form and issuing a separate brochure several pages long containing a brief introduction and the items appearing under the heading "Agenda". Both that idea and that of the observer for Australia deserved further consideration.

25. Mr. GRIFFITH (Observer for Australia) said that the two proposals actually sought to address the same concern: that the essentials should be collected and presented clearly. His own proposal led him to withdraw his remark concerning section K. Perhaps it would be better to expand the "Agenda" headings in order to give an overview of the content of the Guidelines.

Section L

26. Mr. GRIFFITH (Observer for Australia) drew the attention of the secretariat to the fact that the issue of confidentiality, which had been raised in connection with submissions, applied also to hearings.

27. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 2, in brackets, said that his delegation found the paragraph acceptable with the exception of the second sentence, which invited the arbitrators to indicate to the parties at the hearing the strengths and weaknesses of their respective cases. That was very dangerous advice, and the sentence should be deleted.

28. Mr. HOLTZMANN (United States of America) also believed that it would be entirely premature for the arbitrators to give their opinion as to the strengths

and weaknesses of the parties' cases at the hearing stage, except perhaps when the three arbitrators agreed that the presentation of an argument which was irrelevant, in their view, would be a waste of time. Such a scenario was highly improbable, of course, because the arbitrators would not have an opportunity to consult among themselves during the hearing, and it would be completely inappropriate for them to consult before having heard the parties. At any rate, that question had not been addressed in the Guidelines, which were supposed to offer recommendations on what to do at a preparatory conference and not at a hearing. That comment applied not only to the second sentence but to all of paragraph 2, which should be deleted along with paragraph 5 for the same reasons.

29. In paragraph 7, the Guidelines recommended that the dates of hearings should not be fixed until the written submissions had been received. While that was probably justified in some situations, in others it could be important to fix the dates so that the parties could organize themselves accordingly. There again, it was evident that it would be preferable for the Guidelines to limit themselves to the essentials without trying to tell the arbitrators how they ought to conduct the arbitral proceeding. The fewer issues raised that could lend themselves to controversy in practice, the greater the chances that the Guidelines would be widely accepted.

The meeting was suspended at 11.40 a.m. and resumed at 12.25 p.m.

30. Mr. CHATURVEDI (India) agreed with the representative of the United States of America that the issues raised under items (i), (ii) and (iii) were premature. No answer could be given to the first two unless the proceedings ran their course and it was deemed necessary to impose such deadlines. As for knowing the order in which the parties would make their oral presentations (item (iii)), paragraph 11 rightly stipulated that it was for the claimant to make his opening statement, after which the defendant was called upon to present his rebuttal.

31. His delegation also did not agree with the second sentence of paragraph 2, which stated that the hearing offered the arbitral tribunal an opportunity to indicate to the parties, in a fair and impartial manner what, in the view of the tribunal, were the strengths and weaknesses of their cases, because that was not one of the duties of an arbitral tribunal, any more than was the idea, expressed in the last sentence of paragraph 5, that the arbitral tribunal could assist in the narrowing of issues by giving the parties its assessment of the argued issues.

32. Mr. KOUVSHINOV (Russian Federation) said that, although he did not doubt that the Guidelines under consideration would be of great practical use, especially in the arbitration of particularly complex matters, on reading them, he had the impression that they were intended for proceedings of a legal nature. Commercial arbitration should be a flexible procedure that could be adapted to the settlement of various types of disputes. He feared that the Guidelines might lead to a kind of legal formalism.

33. Mr. HOLTZMANN (United States of America) was pleased that paragraph 13 noted that the examples given were in no way obligatory or exhaustive. He

questioned the usefulness of paragraphs 11 and 12, however, which, in his view, were neither necessary nor strictly accurate. The purpose of the Guidelines was to point out to parties that it was desirable to establish the order of the various phases of the proceedings, not to tell the arbitrators how they were supposed to exercise their discretionary power, because many factors entered into such a decision. It should therefore be left to the arbitral tribunal, after consultation with the parties, to choose the procedural pattern to be followed, without spelling out in detail the various steps that the arbitral tribunal and the parties might wish to take.

34. His delegation's doubts as to some of the examples contained in paragraphs 11 and 12 had to do with the fact that one of the reasons often given for not enforcing awards made under the New York Convention and various domestic laws was that the defendant had not been allowed to present its arguments. Care should be taken, then, when speaking of hearings and witnesses, not to cite the current Guidelines in enforcement proceedings in support of the notion that one party had not been given an opportunity to present its defence.

35. Mr. CHATURVEDI (India) said that he favoured retaining paragraph 11, which he considered to be appropriate. The idea of considering whether hearings should be held, stated in the chapeau to section L, was unfounded, since hearings were almost inevitable. The chapeau should therefore be reworded.

36. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the United States of America that paragraphs 11 and 12 were misleading and appeared to reflect the opposite of the flexibility arbitral proceedings were supposed to have, not to mention the fact that they could compromise the enforcement of an arbitral award by giving the impression that one of the parties had not been given an opportunity to present its arguments.

37. Mr. KOUVSHINOV (Russian Federation) said that, while he agreed with the representative of India that arbitral proceedings must involve hearings, he thought that the arbitral tribunal could be flexible; one could not exclude the possibility that the parties might reach an amicable settlement before the proceedings actually began. There would then be no need for hearings, and the arbitrators would simply be informed that the parties had reached an agreement.

38. Mr. HOLTZMANN (United States of America) said that paragraphs 14 and 15 (item (v)) were somewhat problematic in view of the wide range of practice that existed in the submission of notes to the arbitral tribunal. Although it was possible under certain legal systems for the parties to submit to the tribunal, either at the outset or at the end of their oral statements, notes summarizing their arguments and listing in detail the cases cited by the party concerned, such notes occasionally went so far as to cite cases which had not been mentioned or heard during the hearing or which the other party was hearing about for the first time.

39. That led him to wonder whether the parties ought to be allowed to submit such notes, particularly at the end of a hearing, since the other party was thus deprived of an opportunity to comment thereon, giving rise to the problem of unequal treatment of the parties.

40. What was more, the notion that such notes could be submitted after the hearing seemed to contradict article 29 of the UNCITRAL Arbitration Rules, which stipulated that the arbitral tribunal could, after ascertaining that the parties had no further submissions to make, declare the hearing closed. However, the closing of the hearing in itself posed the problem of its reopening as well as a whole series of related questions.

41. For that reason his delegation proposed that the wording of paragraphs 14 and 15 should be simplified.

42. Mr. CHATURVEDI (India) said that he fully endorsed paragraph 11, since the submission of notes seemed to him to be a means of facilitating the work of the arbitrators, and it was in any case permissible for the other party at the hearing to submit a réplique. In paragraph 15, the word "speeches" should be replaced by the word "arguments", which was more accurate.

43. As to the proposed wording of the third sentence of paragraph 17, under item (vi), which indicated that the presiding arbitrator could also consecutively dictate to a typist a summary of oral statements, his delegation questioned the practicality of such an arrangement, since in practice typists attended the hearings and took notes throughout.

44. Mr. KOUVSHINOV (Russian Federation), recalling that the Commission was still dealing with the preparatory conference phase, said that the essence of item (vi) was not so much determining whether notes could be submitted as it was determining whether it was permissible to analyse the arguments and transcripts produced. In his view, the Commission should limit itself at present to the checking of transcripts.

Section M

45. Mr. ABASCAL ZAMORA (Mexico) said that he had found a major translation error in the Spanish text, which referred to the language or languages to be used in the hearings, whereas the English version, for example, correctly referred to the language or languages to be used in the proceedings. In addition, his delegation did not agree at all with the idea expressed in the first sentence of paragraph 2 that it might be useful to consider at the preparatory conference the extent to which the agreement of the parties or the determination by the arbitral tribunal was to be applied. In fact, the language of the proceedings was determined either jointly by the parties or, failing that, by the arbitral tribunal, which was empowered to conduct the arbitral proceedings as it deemed appropriate, provided that the principle of equality of the parties was respected and both parties were given an opportunity to present their arguments.

46. Mr. HOLTZMANN (United States of America) wondered whether, in the light of the statement by the representative of Mexico, the meaning of paragraph 2 had been accurately rendered in the English text as well. That paragraph stated that, apart from the manner in which the choice of language was made, emphasis should be placed on the scope or extent of the agreement - in other words, on whether or not all the documents submitted must be in the language of the

proceedings and the agreement. Consequently, the English text should also be made more specific.

47. Mr. BONELL (Italy), pursuing the idea raised by the representative of the United States of America, said that the whole text should be improved since the provision was an important one which often gave rise to many problems.

48. Mr. ILLESCAS (Spain) agreed with the representative of Mexico that the Spanish text wrongly limited the scope of the agreement to the language of the hearings. The text should state clearly that what had to be done was, first, to settle the matter of the language to be used in the proceedings as a whole and, subsequently, to determine who should make that choice, something that was clearly not apparent from paragraphs 1 and 2 of the Spanish text and even less from the English text. That part of section M could thus stand to be reviewed. Also, paragraphs 1 and 2 had too didactic a tone which was out of place in a text intended for experts. In any case, those paragraphs were unnecessary.

49. Lastly, in addition to the relevant example of one specific problem in paragraph 2, the main problem raised was determining whether the language of the proceedings had to be decided at the outset and who was to take that decision.

50. Mr. AL-NASSER (Saudi Arabia) pointed out that the language of the proceedings was of particular importance given that the weaker party in a dispute was likely to be placed at a disadvantage by his poor command of the language of the proceedings. His delegation would prefer that the language of the proceedings should be that of the dispute, unless the parties agreed otherwise. The point of departure should be the language of the disputed transaction or, failing that, a language chosen by the parties.

51. The CHAIRMAN asked the representative of Saudi Arabia to clarify what he meant by the language of the dispute.

52. Mr. AL-NASSER (Saudi Arabia) replied that he meant the language in which the contract that was the subject of the dispute between the parties had been drafted.

The meeting rose at 1.05 p.m.